

The matter does not rest here. It was strongly urged upon me, as a second limb to the defence argument that since the said property was registered in the name of the defendant, her title was indefeasible by virtue of section 42 of the Land Code (Cap. 138). Now, in *Re Noorijah deceased, supra*, the deceased's estate could have resisted the claim of the husband on the ground of indefeasibility of title under section 42 of the Land Code (Cap. 138). It must be assumed that the court was aware of that provision of law. If that was so, it would follow that the beneficiaries of the deceased could have obtained a share of the estate. Again, in *Habsah bte Mat v. Abdullah, supra*, it can be seen that the husband could in like manner have resisted the claim of the wife by invoking indefeasibility of title under section 43 of the Kedah Land Enactment (No. 56). Had he taken that course it may be that the plaintiff wife would have lost her claim to a half share in the land as *harta sapencharian*. I must again assume that the court had taken cognisance of section 43 of the Land Enactment. In *Hujah Lijah bte Jamal v. Fatimah bte Diah, supra*, if the deceased's estate had resisted the claim of the plaintiff widow by taking advantage of the indefeasibility of title provision under section 37 of the Kelantan Land Enactment, 1938, the plaintiff would have lost her claim to a half share in her husband's estate as *harta sapencharian*. It may now be asked why in those three cases the provisions of the Land Enactments with regard to indefeasibility of title were never invoked. To my mind the answer is obvious. It is implicit from the three judgments that the provisions of the Land Enactments with regard to indefeasibility of title are not amenable to matters pertaining to *harta sapencharian*. That being so, counsel's argument cannot be sustained.

Coming back to the plaintiff's claim, it is necessary to determine what is the division of the share between the plaintiff and the defendant. Although the court has power to refer such matters to the Majlis under section 41 sub-section (4) of the Administration of Muslim Law Enactment, 1952, I am prepared, in view of the circumstances of this case, to award an equal share to each of the parties if they agree.

In the circumstances, it is in the best interests of both parties that the said property be sold under the supervision of the court and the net proceeds be shared equally between them. I shall also order that the defendant pay to the plaintiff 50 *per cent.* of the total rent received by the defendant in respect of the said property from the date of the divorce up till the date of sale.

With regard to the counter-claim, the defen-

dant is asking:

- (1) a balance of \$900 in respect of *Eddah*. It is admitted that a sum of \$600 was paid. The plaintiff contended that the defendant had received \$1,800 in respect of three months' rental at \$600 per month. Since it is to be divided equally, the defendant is deemed to have received \$900 as her share. I cannot accept this contention. In my view, the effective date is from the date of divorce. The money obtained from the rent was used in respect of household expenses and it cannot be said that there is certainty as to how much each party is allowed to receive under that item. I would allow this claim;
- (2) a sum of \$5,700 as compensation. This is admitted by the plaintiff, and I would allow the claim.

With regard to costs, each party will bear his or her own costs.

I have been asked by counsel for the defendant to stay the issue with regard to the division of the share so that he may get instructions from his client. I therefore adjourn this case to 29th November, 1965.

Raja Azlan Shah (on November 29): Having now been told by both counsel that each party agrees to a half share in the subject matter of this suit, I will order accordingly.

Order accordingly.

Solicitors: Braddell & Ramani; Ariffin & Ooi.

LOW PIN v. LIKOK FINANCE CO. LTD.

[A.C.J. (Abdul Aziz J.) November 22, 1965]

[K.L. — Civil Appeal No. 17 of 1965]

Landlord and Tenant — Demolition — Permission to demolish house — Plank and zinc building — Whether building premises comprised in a tenancy — Intention of landlord to demolish premises for the purpose of rebuilding — Control of Rent Ordinance, 1956, s. 12.

This was an appeal against the decision of the Rent Assessment Board, Kuala Lumpur, granting permission to the respondent to demolish a house. The grounds of appeal were in effect: (a) the building was of a temporary character and was not part of the premises comprised in the tenancy; and (b) the board had made an error on the fact that the applicant intended to recover the premises for the purposes of rebuilding.

Held: (1) whether the landlord intended to demolish the premises for the purpose of rebuilding was a question of fact and there was more than ample evidence for the board to come to a finding on this question of fact;

(2) the building was not temporary in character and was comprised in the tenancy.

Cases referred to:—

- (1) *Gurcharan Kaur v. Rochi Silk Store* [1959] M.L.J. 229.

(2) *Soong Co. Ltd. & Anor. v. Teoh Cheng Sim* A
[1956] M.L.J. 16.

(3) *Indo-Australian Trading Co. Ltd. v. Png Lim Chua* [1954] M.L.J. 155.

(4) *Veerapillai v. Ooi Swee Hoe* [1961] M.L.J. 260.

CIVIL APPEAL.

Chai Fook Kow for the appellant.

K. A. Menon for the respondent.

Abdul Aziz J. (delivering oral judgment): This is an appeal under section 11(1) of the Control of Rent Ordinance 1956 against the decision of the Rent Assessment Board, Kuala Lumpur, granting permission to the respondent to demolish house No. 20-6 Kampong Siam, Pahang Road, Kuala Lumpur.

It would appear from the evidence that one Lim Lan (respondent No. 1 in the original action) was let to possession of vacant land by the respondent's predecessor-in-title some fifty years ago on which she erected a building "of zinc roof, cement floor, plank walls and wooden pillars". It is claimed that the building is a building of temporary character although it was built five decades ago and is apparently still fit for human habitation. The appellant (second respondent in the original action) became the tenant of Lim Lan some time in 1948 and has been occupying the premises ever since. On the 19th November 1964 the present owners (the respondent) moved the Rent Assessment Board for leave to demolish the premises for rebuilding as they intended to put up flats, shop houses and a market on the land and they claimed that it was in the public interest that they should be allowed to do so. The board heard the application and made an order in terms of the application as follows:—

"The board is satisfied that the applicant intends to demolish premises No. 20-6 at Kampong Siam, Pahang Road, Kuala Lumpur for the purpose of rebuilding and in its opinion it is in the public interest that he should be permitted so to do subject to the condition that the respondents should be allowed to occupy the premises until 30.9.1965."

Against that decision the appellant now appeals.

There is only one ground of appeal relied upon by the appellant and it was couched in terms so vague that as a piece of forensic aberration I would like to reproduce it in full —

"(1) he failed to dismiss the application of the applicant as he had no jurisdiction to hear the application as it could not be brought under section 12(1)(m) of the Control of Rent Ordinance but should have been brought in a court of adequate jurisdiction under section 12(1)(l) of the Control of Rent Ordinance for the following reasons:—

- (a) that the premises when originally let consisted of vacant land and there has since been erected thereon a building of a temporary character;
- (b) that he failed to consider the only direct and positive evidence of the 2nd respondent and came to the

erroneous conclusion that the premises in question No. 20-6, Pahang Road, Kuala Lumpur, was not a building of a temporary character.

(2) he misdirected himself on the evidence that the applicant intends to demolish them for the purpose of rebuilding."

After hearing Mr. Chai, counsel for the appellant, I gather that the appellant's complaints are —

- (i) the board had no jurisdiction to hear the application under section 12(1)(m) be- the premises, when originally let, consisted of vacant land and there was erected on it a building of temporary character;
- (ii) the application should have been made under section 12(1)(l) of the Ordinance;
- (iii) that the board was wrong in holding that the building in question was not a building of temporary character; and
- (iv) that the board has made an error on the fact that the applicant intended to recover the premises for the purposes of rebuilding.

I consider that there are no merits in any of the grounds. In the first place it should have been obvious to counsel for the appellant that under section 11(1) of the Ordinance no appeal lies which is an appeal on a question of fact. In *Gurcharan Kaur v. Rochi Silk Store* ⁽¹⁾ it was held by the Court of Appeal that the question whether the landlord intended to demolish the premises for the purpose of rebuilding is a question of fact. The Court of Appeal also sets out the circumstances under which an appeal court will upset the decision of the board on a question of fact. *Ex facie* the record, there is more than ample evidence for the board to come to a finding on that question of fact.

The sole point on the question of jurisdiction calling for a consideration is whether the conditions under which an application under section 12(1)(m) may be made have been satisfied and that question is whether the building is "premises comprised in a tenancy" and whether the respondent was the owner thereof. It has generally been admitted that the building was of plank and zinc attached to the earth with concrete floors. It is immovable. It was held in *Soong Co. Ltd. & Anor. v. Teoh Cheng Sim* ⁽²⁾ (*per* Spenser Wilkinson J.) —

"In my opinion when any building (apart from trade fixtures and certain types of movable structure in respect of which a local custom to treat them as movables might be allowed to be proved) is erected upon land the title of the building is inseparable from the title of the land."

In *Indo-Australian Trading Co. Ltd. v. Png Lim Chua* ⁽³⁾ Murray-Aynsley C.J. decided that the meaning of the word "temporary" as applied to buildings is a question of degree. A building which has lasted twenty-seven years which is still habitable is evidence that the building is not of

a temporary character. Since the building in question had been erected fifty years ago and is still habitable, I cannot uphold the appellant's contention that the building was temporary in character or that the title of the building was separable from the land. The other point as regards the meaning of "premises comprised in a tenancy" was not raised before the board nor was it strenuously argued before me in this appeal. In view of the relationship between respondent (2) and (1) in the original action and the respondent and the decision of Rigby J. in *Veerapillai v. Ooi Swee Hoe* ⁽⁴⁾ I also cannot uphold the contention that the premises were not comprised in a tenancy.

The other point that the landlord should have applied under section 12(1) (l) of the Ordinance has no relevance. The board's function when an application is made under section 12(1) (m) is limited to a consideration whether the conditions under that section have been satisfied before it makes an order. In this respect the board has rightly come to the conclusion that these conditions have been satisfied.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

Solicitors: S. Y. Chan & Co.; Richard Talalla & Menon.

LING HAN LIANG v. LING MING SIENG

[O.C.J. (Lee Hun Hoe J.) November 22, 1965]

[Sibu — Matrimonial Cause No. 15 of 1965]

Husband and Wife — Restitution of conjugal rights — Grounds for refusal — Adultery — Failure to maintain.

The parties were married according to Foochow Custom. The husband-petitioner alleged that the respondent left the matrimonial home without reasonable cause and he prayed for a decree of restitution of conjugal rights. The wife in her defence alleged that the husband had committed adultery and had failed to maintain herself and her children.

Held: the evidence showed that the petitioner had committed adultery and had failed to provide his wife with proper maintenance and therefore the petitioner had failed to discharge the onus of establishing that the wife had deserted him without reasonable excuse.

Cases referred to:—

- (1) *Mann v. Mann* [1922] P. 238.
- (2) *Harnett v. Harnett* [1924] P. 41.
- (3) *Wells v. Wells* [1954] 1 W.L.R. 1391.
- (4) *Scott v. Scott* 4 Sw. & Tr. 114.
- (5) *Russell v. Russell* [1895] P. 315.
- (6) *Wee Hock Guan v. Chia Chit Neo & Anor.* [1964] M.L.J. 217.

MATRIMONIAL CAUSE.

C. T. Wong for the petitioner.

Respondent in person.

Lee Hun Hoe J.: The parties were married according to Foochow custom on 19th August, 1959. After the marriage they lived and cohabited at various places and in particular at 4½ Mile, Repok Road, Sarikei. They have two daughters. Petitioner alleged that respondent left the matrimonial home with their two daughters sometime in February 1963 without reasonable cause. He therefore prayed for a decree of restitution of conjugal rights.

Petitioner is the youngest of five sons of Ling Hung Choon (P.W.4). Petitioner and his family lived with P.W.4. He operated a taxi speedboat normally plying between Sarikei and Sibu and had to spend a considerable number of nights from home. He said he returned home between 10 to 20 nights in a month. Respondent did not agree. She stated that he used to return home once a week previously. Then he began to come home once or twice a month until February 1963 when he did not return home at all. She suspected that he had kept a mistress. She complained that from February to May 1963 petitioner did not give her any money. She admitted that her father-in-law did look after her and the children. Eventually she took the children to live with her mother at Sungei Gurugu, Sarikei. Since then approaches were made by the area headman Wong Kung Tuang (P.W.2) to persuade respondent to return home but she refused.

Some time in February 1964 she took out a summons against petitioner in the district court, Sarikei for maintenance. Later, on her application, another magistrate found great difficulty in enforcing the rather vague order of the trial magistrate. Eventually petitioner appealed to this court and succeeded in getting the order set aside on ground of irregularity.

One night in February 1965 at about 8 p.m. respondent with her brother Ling Beng Aik (D.W.3) and Isa (D.W.2) went to Haji Bujang's house. There they found petitioner and a woman named Ting Pek Hung in a room adjoining another room occupied by Cheung Swee Leong (P.W.5) and his family. Respondent questioned the petitioner who admitted that he was living there with Ting Pek Hung whom he also regarded as his wife. Ting Pek Hung also let it be known that petitioner was her husband and that she had two children by him. A quarrel ensued and a fight nearly took place had it not been prevented by those present including P.W.5 who had returned shortly after respondent arrived at the house.

P.W.5 said that the rooms were rented by him and that Ting Pek Hung was employed by him for a month during his wife's confinement. He said petitioner used to visit him quite often